

**In re: PMD PRODUCE BROKERAGE CORP.**  
**PACA Docket No. D-99-0004.**  
**Order Denying Petition for Reconsideration filed March 31, 2000.**

**Petition for reconsideration – Late petition – Late appeal – Federal Register gives constructive notice – Administrative law judge authority to modify rules of practice – Hearing clerk authority to modify rules of practice – Bench decision – Effective date.**

The Judicial Officer denied Respondent's Petition for Reconsideration because it was not timely filed (7 C.F.R. § 1.146(a)(3)). The Judicial Officer also stated that even if Respondent's Petition for Reconsideration had been timely filed, it would have been rejected because Respondent did not raise any meritorious basis for finding *In re PMD Produce Brokerage Corp.*, 59 Agric. Dec. \_\_\_\_ (Feb. 18, 2000) (Order Denying Late Appeal), erroneous. The Judicial Officer found that, under the Rules of Practice (7 C.F.R. § 1.142(c)), the date Judge Bernstein (ALJ) orally announced the decision at the close of the November 17, 1999, hearing, was the operative date for determining the timeliness of Respondent's appeal petition. The Judicial Officer rejected Respondent's contention that the operative date for determining the timeliness of Respondent's appeal petition was the date the Hearing Clerk furnished Respondent with a document entitled "Bench Decision." The Judicial Officer concluded that, under the Rules of Practice (7 C.F.R. § 1.142(c)), the document entitled "Bench Decision" was merely an excerpt from the portion of the transcript containing the orally-announced decision, and the date the Hearing Clerk furnished Respondent with the document entitled "Bench Decision" was not relevant to the determination of the time for filing Respondent's appeal petition.

Jane McCavitt, for Complainant.  
Paul T. Gentile, New York, NY, for Respondent.  
Initial decision issued by Edwin S. Bernstein, Administrative Law Judge.  
*Order issued by William G. Jensen, Judicial Officer.*

The Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1-.49); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice] by filing a Complaint on November 16, 1998.

The Complaint alleges that: (1) during the period February 1993 through September 1996, PMD Produce Brokerage Corp. [hereinafter Respondent] failed to make full payment promptly to 18 sellers of the agreed purchase prices in the total amount of \$767,426.45 for 633 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in interstate commerce (Compl. ¶ III); and (2) Respondent's failures to make full payment promptly of the agreed purchase prices for perishable agricultural commodities that Respondent purchased, received, and accepted in interstate or foreign commerce constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Compl. ¶ IV).

Respondent filed an Answer on January 6, 1999, denying the material allegations of the Complaint (Answer ¶¶ 3-4).

On September 7, 1999, Administrative Law Judge Edwin S. Bernstein [hereinafter the ALJ] scheduled a hearing for November 17, 1999, in New York, New York (Notice of Hearing). On November 12, 1999, Complainant filed Motion for Bench Decision and Complainant's Proposed Findings of Fact, Conclusions, and Order, requesting that the ALJ issue a decision orally at the close of the hearing in accordance with section 1.142(c)(1) of the Rules of Practice (7 C.F.R. § 1.142(c)(1)).

On November 17, 1999, the ALJ presided over a hearing in New York, New York. Deborah Ben-David, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented Complainant.<sup>1</sup> Paul T. Gentile, Gentile & Dickler, New York, New York, represented Respondent. The ALJ issued a decision orally at the close of the hearing in which the ALJ: (1) found that during the period February 1993 through September 1996, Respondent failed to make full payment promptly to 18 sellers of the agreed purchase prices in the total amount of \$767,426.45 for 633 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in interstate or foreign commerce; (2) found that Respondent continued to owe approximately \$769,000 to produce sellers listed in the Complaint; (3) concluded that Respondent's failures to make full payment promptly of the agreed purchase prices for 600 lots of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate or foreign commerce, as specified in the Complaint, are willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (4) ordered publication of the order (Tr. 95-101).

The ALJ excerpted from the transcript the decision orally announced at the close of the hearing, and on November 30, 1999, filed a document entitled "Bench Decision," which is the written excerpt of the decision orally announced at the close of the hearing. On December 7, 1999, the Hearing Clerk furnished Respondent with a copy of the Bench Decision.<sup>2</sup>

On January 7, 2000, Respondent appealed to the Judicial Officer; on February 14, 2000, Complainant filed Complainant's Response to Respondent's Appeal; and on February 15, 2000, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for decision. On February 18, 2000, I denied Respondent's Appeal Petition on the ground that it was late-filed. *In re PMD Produce Brokerage Corp.*, 59 Agric. Dec. \_\_\_\_ (Feb. 18, 2000) (Order Denying Late Appeal).

---

<sup>1</sup>On January 13, 2000, Jane McCavitt entered an appearance on behalf of Complainant (Notice of Appearance).

<sup>2</sup>See Domestic Return Receipt for Article Number Z 599 734 374.

On February 25, 2000, the Hearing Clerk served Respondent with the Order Denying Late Appeal;<sup>3</sup> on March 15, 2000, Respondent filed Respondent's Petition for Reconsideration; on March 29, 2000, Complainant filed Complainant's Response to Respondent's Motion for Reconsideration; and on March 30, 2000, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for reconsideration of *In re PMD Produce Brokerage Corp.*, 59 Agric. Dec. \_\_\_\_ (Feb. 18, 2000) (Order Denying Late Appeal).

Section 1.146(a)(3) of the Rules of Practice provides that a petition for reconsideration of the Judicial Officer's decision must be filed within 10 days after service of the decision, as follows:

**§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.**

(a) *Petition requisite.* . . .

. . . .

(3) *Petition to rehear or reargue proceeding, or to reconsider the decision of the Judicial Officer.* A petition to rehear or reargue the proceeding or to reconsider the decision of the Judicial Officer shall be filed within 10 days after the date of service of such decision upon the party filing the petition. Every petition must state specifically the matters claimed to have been erroneously decided and alleged errors must be briefly stated.

7 C.F.R. § 1.146(a)(3).

Respondent filed Respondent's Petition for Reconsideration 19 days after the date the Hearing Clerk served the Order Denying Late Appeal on Respondent. Respondent's Petition for Reconsideration is not timely filed, and Respondent's Petition for Reconsideration must be denied.<sup>4</sup>

---

<sup>3</sup>See Domestic Return Receipt for Article Number PO93174767.

<sup>4</sup>See *In re Mary Meyers*, 58 Agric. Dec. \_\_\_\_ (Oct. 14, 1999) (Order Denying Pet. for Recons.) (denying, as late filed, a petition for reconsideration filed 2 years 5 months and 20 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Anna Mae Noell*, 58 Agric. Dec. \_\_\_\_ (Aug. 30, 1999) (Order Denying the Chimp Farm, Inc.'s Motion to Vacate) (denying, as late-filed, a petition for reconsideration filed 6 months and 11 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Paul W. Thomas*, 58 Agric. Dec. \_\_\_\_ (Aug. 4, 1999) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 19 days after the date the Hearing Clerk served the applicants with the decision and order); *In re Nkiambi Jean Lema*, 58 Agric. Dec. \_\_\_\_ (May 14, 1999) (Order Denying Pet. for Recons. and Mot. to Transfer Venue) (denying, as late-filed, a petition for reconsideration filed 35 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Kevin Ackerman*, 58 Agric. Dec. \_\_\_\_ (Apr. 14, 1999) (Order Denying Pet. for Recons. as to Kevin Ackerman) (denying, as late-filed, a petition for

Moreover, even if Respondent's Petition for Reconsideration had been timely filed, I would deny it because Respondent raised no meritorious basis for finding the Order Denying Late Appeal erroneous.

First, Respondent contends that the Hearing Clerk served Respondent with a copy of the Bench Decision on December 7, 1999, and Respondent filed a timely appeal on January 7, 2000 (Respondent's Pet. for Recons. at 2).

The record establishes that the ALJ excerpted from the transcript the decision orally announced at the close of the November 17, 1999, hearing, and on November 30, 1999, filed a document entitled "Bench Decision," which is the written excerpt of the decision orally announced at the close of the November 17, 1999, hearing. The Hearing Clerk furnished Respondent with a copy of the Bench Decision on December 7, 1999,<sup>5</sup> and on January 7, 2000, Respondent filed its Appeal Petition. However, Respondent's reliance on the date on which the Hearing Clerk furnished Respondent with a copy of the Bench Decision to determine the timeliness of Respondent's Appeal Petition is misplaced. Section 1.142(c)(1), (c)(2), and (c)(4) of the Rules of Practice provides that an administrative law judge may issue a decision orally at the close of the hearing, that the issuance date of an oral decision is the date that the oral decision is announced, and that the oral decision becomes effective, without further proceedings, 35 days after the decision

---

reconsideration filed 17 days after the date the Hearing Clerk served the respondent with the order denying late appeal as to Kevin Ackerman); *In re Marilyn Shepherd*, 57 Agric. Dec. 1280 (1998) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 11 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Jack Stepp*, 57 Agric. Dec. 323 (1998) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 16 days after the date the Hearing Clerk served the respondents with the decision and order); *In re Billy Jacobs, Sr.*, 55 Agric. Dec. 1057 (1996) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 13 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Jim Fobber*, 55 Agric. Dec. 74 (1996) (Order Denying Respondent Jim Fobber's Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 12 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Robert L. Heywood*, 53 Agric. Dec. 541 (1994) (Order Dismissing Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration filed approximately 2 months after the date the Hearing Clerk served the respondent with the decision and order); *In re Christian King*, 52 Agric. Dec. 1348 (1993) (Order Denying Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration, since it was not filed within 10 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Charles Crook Wholesale Produce & Grocery Co.*, 48 Agric. Dec. 1123 (1989) (Order Dismissing Untimely Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration filed more than 4 months after the date the Hearing Clerk served the respondent with the decision and order); *In re Toscony Provision Co.*, 45 Agric. Dec. 583 (1986) (Order Denying Pet. for Recons. and Extension of Time) (dismissing a petition for reconsideration because it was not filed within 10 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Charles Brink*, 41 Agric. Dec. 2147 (1982) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 17 days after the date the Hearing Clerk served the respondent with the decision and order).

<sup>5</sup>See Domestic Return Receipt for Article Number Z 599 734 374.

is announced orally, as follows:

**§ 1.142 Post-hearing procedure.**

....

(c) *Judge's decision.* (1) The Judge may, upon motion of any party or in his or her own discretion, issue a decision orally at the close of the hearing, or within a reasonable time after the closing of the hearing.

(2) If the decision is announced orally, a copy thereof, excerpted from the transcript or recording, shall be furnished to the parties by the Hearing Clerk. Irrespective of the date such copy is mailed, the issuance date of the decision shall be the date the oral decision was announced.

....

(4) The Judge's decision shall become effective without further proceedings 35 days after the issuance of the decision, if announced orally at the hearing, or if the decision is in writing, 35 days after the date of service thereof upon the respondent, unless there is an appeal to the Judicial Officer by a party to the proceeding pursuant to § 1.145; *Provided, however*, that no decision shall be final for purposes of judicial review except a final decision of the Judicial Officer upon appeal.

7 C.F.R. § 1.142(c)(1)-(2), (4).

The record establishes that the ALJ announced the decision orally at the close of the hearing on November 17, 1999. Therefore, pursuant to section 1.142(c)(2) of the Rules of Practice (7 C.F.R. § 1.142(c)(2)), the issuance date of the ALJ's decision is November 17, 1999, and pursuant to section 1.142(c)(4) of the Rules of Practice (7 C.F.R. § 1.142(c)(4)), the effective date of the ALJ's decision is December 22, 1999. Respondent's Appeal Petition, filed January 7, 2000, was not filed before the ALJ's November 17, 1999, decision became effective, and the Judicial Officer has no jurisdiction under the Rules of Practice to hear an appeal that is filed after an administrative law judge's decision becomes effective.<sup>6</sup>

---

<sup>6</sup>See *In re Harold P. Kafka*, 58 Agric. Dec. \_\_\_\_ (Apr. 5, 1999) (dismissing the respondent's appeal, filed 15 days after the initial decision and order became final), *appeal docketed*, No. 99-5313 (3<sup>d</sup> Cir. May 13, 1999); *In re Kevin Ackerman*, 58 Agric. Dec. \_\_\_\_ (Feb. 3, 1999) (dismissing respondent Kevin Ackerman's appeal, filed 1 day after the initial decision and order became final); *In re Severin Peterson*, 57 Agric. Dec. 1304 (1998) (dismissing the applicants' appeal, filed 23 days after the initial decision and order became final); *In re Queen City Farms, Inc.*, 57 Agric. Dec. 813 (1998) (dismissing the respondent's appeal, filed 58 days after the initial decision and order became final); *In re Gail Davis*, 56 Agric. Dec. 373 (1997) (dismissing the respondent's appeal, filed 41 days after the initial decision and order became final); *In re Field Market Produce, Inc.*, 55 Agric. Dec. 1418 (1996) (dismissing the respondent's appeal, filed 8 days after the initial decision and order became effective); *In re Ow Duk Kwon*, 55 Agric. Dec. 78 (1996) (dismissing the respondent's appeal, filed 35 days after the initial decision and order became effective); *In re New York Primate Center, Inc.*, 53 Agric. Dec.

Respondent had notice of the Rules of Practice. The Rules of Practice are published in the *Federal Register*; thereby constructively notifying Respondent of the time within which Respondent was required to file its Appeal Petition.<sup>7</sup>

---

529 (1994) (dismissing the respondents' appeal, filed 2 days after the initial decision and order became final); *In re K. Lester*, 52 Agric. Dec. 332 (1993) (dismissing the respondent's appeal, filed 14 days after the initial decision and order became final and effective); *In re Amril L. Carrington*, 52 Agric. Dec. 331 (1993) (dismissing the respondent's appeal, filed 7 days after the initial decision and order became final and effective); *In re Teofilo Benicta*, 52 Agric. Dec. 321 (1993) (dismissing the respondent's appeal, filed 6 days after the initial decision and order became final and effective); *In re Newark Produce Distributors, Inc.*, 51 Agric. Dec. 955 (1992) (dismissing the respondent's appeal, filed after the initial decision and order became final and effective); *In re Laura May Kurjan*, 51 Agric. Dec. 438 (1992) (dismissing the respondent's appeal, filed after the initial decision and order became final); *In re Kermit Breed*, 50 Agric. Dec. 675 (1991) (dismissing the respondent's late-filed appeal); *In re Bihari Lall*, 49 Agric. Dec. 896 (1990) (stating that the respondent's appeal, filed after the initial decision became final, must be dismissed because it was not timely filed); *In re Dale Haley*, 48 Agric. Dec. 1072 (1989) (stating that the respondents' appeal, filed after the initial decision became final and effective, must be dismissed because it was not timely filed); *In re Mary Fran Hamilton*, 45 Agric. Dec. 2395 (1986) (dismissing the respondent's appeal, filed with the hearing clerk on the day the initial decision and order had become final and effective); *In re Bushelle Cattle Co.*, 45 Agric. Dec. 1131 (1986) (dismissing the respondent's appeal, filed 2 days after the initial decision and order became final and effective); *In re William T. Powell*, 44 Agric. Dec. 1220 (1985) (stating that it has consistently been held that, under the Rules of Practice, the Judicial Officer has no jurisdiction to hear an appeal after the initial decision and order becomes final); *In re Toscony Provision Co.*, 43 Agric. Dec. 1106 (1984) (stating that the Judicial Officer has no jurisdiction to hear an appeal that is filed after the initial decision becomes final), *aff'd*, No. 81-1729 (D.N.J. Mar. 11, 1985) (court reviewed merits notwithstanding late administrative appeal), *aff'd*, 782 F.2d 1031 (3<sup>d</sup> Cir. 1986) (unpublished); *In re Dock Case Brokerage Co.*, 42 Agric. Dec. 1950 (1983) (dismissing the respondents' appeal, filed 5 days after the initial decision and order became final); *In re Veg-Pro Distributors*, 42 Agric. Dec. 1173 (1983) (denying the respondent's appeal, filed 1 day after the default decision and order became final); *In re Samuel Simon Petro*, 42 Agric. Dec. 921 (1983) (stating that the Judicial Officer has no jurisdiction to hear an appeal that is filed after the initial decision and order becomes final and effective); *In re Yankee Brokerage, Inc.*, 42 Agric. Dec. 427 (1983) (dismissing the respondent's appeal filed on the day the initial decision became effective); *In re Charles Brink*, 41 Agric. Dec. 2146 (1982) (stating that the Judicial Officer has no jurisdiction to consider the respondent's appeal dated before the initial decision and order became final, but not filed until 4 days after the initial decision and order became final and effective), *reconsideration denied*, 41 Agric. Dec. 2147 (1982); *In re Mel's Produce, Inc.*, 40 Agric. Dec. 792 (1981) (stating that since the respondent's petition for reconsideration was not filed within 35 days after service of the default decision, the default decision became final and neither the administrative law judge nor the Judicial Officer has jurisdiction to consider the respondent's petition); *In re Animal Research Center of Massachusetts, Inc.*, 38 Agric. Dec. 379 (1978) (stating that failure to file an appeal before the effective date of the initial decision is jurisdictional); *In re Willie Cook*, 39 Agric. Dec. 116 (1978) (stating that it is the policy of the United States Department of Agriculture not to consider appeals filed more than 35 days after service of the initial decision).

<sup>7</sup>*FCIC v. Merrill*, 332 U.S. 380, 385 (1947); *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 71 (2<sup>d</sup> Cir. 1994); *Government of Guam v. United States*, 744 F.2d 699, 701 (9<sup>th</sup> Cir. 1984); *Bennett v. Director, Office of Workers' Compensation Programs*, 717 F.2d 1167, 1169 (7<sup>th</sup> Cir. 1983); *Diamond Ring Ranch, Inc. v. Morton*, 531 F.2d 1397, 1405 (10<sup>th</sup> Cir. 1976).

Moreover, the record establishes that the Hearing Clerk served Respondent with a copy of the Rules of Practice at the commencement of this proceeding;<sup>8</sup> thereby providing Respondent with actual notice of the time within which Respondent was required to file its Appeal Petition.

Second, Respondent asserts that neither the ALJ nor the Hearing Clerk would intentionally misinform Respondent as to the time for filing an appeal petition and that the ALJ's Bench Decision and the Hearing Clerk's December 1, 1999, letter to Respondent, which accompanied a copy of the Bench Decision, each indicate that Respondent had 30 days after the date of service of the Bench Decision to file an appeal petition. Respondent contends that it reasonably relied on the ALJ and the Hearing Clerk. (Respondent's Pet. for Recons. at 2-3.)

The Bench Decision provides that the effective date of the decision is 35 days after service of the decision, unless there is an appeal to the Judicial Officer in accordance with section 1.145 of the Rules of Practice (7 C.F.R. § 1.145), as follows:

This decision will become final without further proceedings 35 days after service of this decision, unless Respondent appeals this decision, pursuant to Section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Bench Decision at 3.

Similarly, the Hearing Clerk's letter transmitting the Bench Decision to Respondent states that Respondent has 30 days from the date of service of the decision in which to file an appeal petition, as follows:

December 1, 1999

Mr. Paul T. Gentile  
Gentile & Dickler  
Attorneys at Law  
15 Maiden Lane  
New York, New York 10038

Dear Mr. Gentile:

**Subject: In re: PMD Produce Brokerage Corp., Respondent**  
**PACA Docket No. D-99-0004**

Enclosed is a copy of the Bench Decision, issued in this proceeding by

---

<sup>8</sup>See the Hearing Clerk's November 16, 1998, letter to Respondent transmitting a copy of the Complaint and a copy of the Rules of Practice to Respondent.

Administrative Law Judge Edwin S. Bernstein, on November 30, 1999.

Each party has thirty (30) days from the service of this decision and order in which to file an appeal to the Department's Judicial Officer.

If no appeal is filed, the Decision and Order shall become binding and effective as to each party thirty-five (35) days after its service. However, no decision or order is final for purposes of judicial review except a final order issued by the Secretary or the Judicial Officer pursuant to an appeal.

In the event you elect to file an appeal, an original and four (4) copies are required. You are also instructed to consult § 1.145 of the Uniform Rules of Practice (7 C.F.R. § 1.145) for the procedure for filing an appeal.

Sincerely,

/s/

Joyce A. Dawson  
Hearing Clerk

Section 1.145 of the Rules of Practice (7 C.F.R. § 1.145), referenced by the ALJ in the Bench Decision and the Hearing Clerk in the December 1, 1999, transmittal letter, states that an appeal petition must be filed within 30 days after receiving service of an administrative law judge's decision, as follows:

**§ 1.145 Appeal to Judicial Officer.**

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, a party who disagrees with the decision, or any part thereof, or any ruling by the Judge or any alleged deprivation of rights, may appeal such decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. As provided in § 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the petition, and the arguments thereon, shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations of the record, statutes, regulations or authorities being relied upon in support thereof. A brief may be filed in support of the appeal simultaneously with the petition.

7 C.F.R. § 1.145(a).

The only decision issued by the ALJ in this proceeding is the decision orally announced at the close of the November 17, 1999, hearing. The document entitled



“Bench Decision,” filed by the ALJ on November 30, 1999, and furnished to Respondent on December 7, 1999, is merely an excerpt from that portion of the transcript that contains the ALJ’s decision. Therefore, I find that, while not without ambiguity, the reference in the Bench Decision, at 3, to “this decision” is a reference to the November 17, 1999, decision orally announced at the close of the hearing and the references in the Hearing Clerk’s December 1, 1999, letter to “this decision and order” and “the Decision and Order” are references to the November 17, 1999, decision orally announced at the close of the hearing.

The references in question are ambiguous because neither the ALJ nor the Hearing Clerk explicitly state whether the references are to the November 17, 1999, decision or to the document entitled “Bench Decision.” Moreover, section 1.142(c)(4) of the Rules of Practice (7 C.F.R. § 1.142(c)(4)) provides that the administrative law judge’s decision becomes effective 35 days after issuance of the decision, if announced orally at the hearing or, if the decision is in writing, 35 days after the date of service of the decision upon the respondent. The ALJ and the Hearing Clerk state in the Bench Decision and the December 1, 1999, transmittal letter, respectively, that the decision becomes effective 35 days after service. These references to the effective date being contingent on the date of service, rather than the date of issuance, lend support to Respondent’s position that the Hearing Clerk’s and the ALJ’s references to the decision are to the document entitled “Bench Decision,” rather than to the decision announced orally at the close of the November 17, 1999, hearing. Nevertheless, I find that, since the only decision issued by the ALJ in this proceeding is the November 17, 1999, decision, the ALJ’s Bench Decision references and the Hearing Clerk’s December 1, 1999, transmittal letter references to the “decision” must be references to the November 17, 1999, decision and not references to the document entitled “Bench Decision.” Moreover, I find that the ALJ’s and Hearing Clerk’s statements that the decision becomes effective 35 days after service, rather than 35 days after issuance, are error.

Even if I agreed with Respondent and found that the ALJ and the Hearing Clerk intended to indicate that the timeliness of Respondent’s Appeal Petition would be determined by the date of service on Respondent of the document entitled “Bench Decision,” that finding would not cause me to conclude that Respondent’s Appeal Petition was timely filed.

As an initial matter, section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)) provides that an appeal must be filed within 30 days after receiving service of the administrative law judge’s decision. The Hearing Clerk furnished Respondent with the Bench Decision on December 7, 1999.<sup>9</sup> Respondent did not file its Appeal Petition until January 7, 2000, 31 days after the Hearing Clerk furnished Respondent with the Bench Decision. Thus, even if the date the Hearing Clerk furnished Respondent with the document entitled “Bench Decision” was used

---

<sup>9</sup>See Domestic Return Receipt for Article Number Z 599 734 374.

to determine timeliness, Respondent's Appeal Petition would be late.<sup>10</sup>

Moreover, it is well settled that the administrative law judges are bound by the Rules of Practice.<sup>11</sup> Likewise, the Hearing Clerk is bound by the Rules of Practice. Neither the ALJ nor the Hearing Clerk has the authority to modify the Rules of Practice to allow Respondent additional time within which to appeal the ALJ's decision orally announced at the close of the hearing in accordance with section 1.142(c) of the Rules of Practice (7 C.F.R. § 1.142(c)). Therefore, even if I found that the ALJ and the Hearing Clerk intended to indicate that the timeliness of Respondent's Appeal Petition would be determined by the date the Hearing Clerk furnished Respondent with the document entitled "Bench Decision," that finding

---

<sup>10</sup>The Judicial Officer has jurisdiction to hear an appeal petition filed after the 30-day appeal time has elapsed but before the administrative law judge's decision becomes final. If an appeal is inadvertently filed up to 4 days late, e.g., because of a delay in the mail system, the Judicial Officer can grant an extension of time for filing a late appeal. See *In re Scamcorp, Inc.*, 55 Agric. Dec. 1395, 1405-06 (1996) (Ruling on Respondent's Motion to Reconsider Ruling Denying Motion to Dismiss Appeal); *In re Sandra L. Reid*, 55 Agric. Dec. 996, 999-1000 (1996); *In re Rinella's Wholesale, Inc.*, 44 Agric. Dec. 1234, 1236 (1985) (Order Denying Pet. for Recons.); *In re William T. Powell*, 44 Agric. Dec. 1220, 1222 (1985) (Order Denying Late Appeal); *In re Palmer G. Hulings*, 44 Agric. Dec. 298, 300-01 (1985) (Order Denying Late Appeal), *appeal dismissed*, No. 85-1220 (10<sup>th</sup> Cir. Aug. 16, 1985); *In re Toscony Provision Co.*, 43 Agric. Dec. 1106, 1108 (1984) (Order Denying Late Appeal), *aff'd*, No. 81-1729 (D.N.J. Mar. 11, 1985) (court reviewed merits notwithstanding late administrative appeal), *aff'd*, 782 F.2d 1031 (3<sup>rd</sup> Cir. 1986) (unpublished); *In re Henry S. Shatkin*, 34 Agric. Dec. 296, 315 (1975) (Order Granting Motion to Withdraw Appeal). Thus, if the operative date for determining the timeliness of Respondent's Appeal Petition had been December 7, 1999, I could grant Respondent an extension of time and consider Respondent's Appeal Petition.

<sup>11</sup>See *In re Far West Meats*, 55 Agric. Dec. 1033, 1036 n.4 (1996) (Ruling on Certified Question) (stating that the judicial officer and the administrative law judge are bound by the Rules of Practice); *In re Hermiston Livestock Co.*, 48 Agric. Dec. 434 (1989) (stating that the judicial officer and the administrative law judge are bound by the Rules of Practice); *In re Sequoia Orange Co.*, 41 Agric. Dec. 1062, 1064 (1982) (stating that the judicial officer has no authority to depart from Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted from Marketing Orders). Cf. *In re Kinzua Resources, LLC*, 57 Agric. Dec. 1165, 1179-80 (1998) (stating that generally administrative law judges and the judicial officer are bound by the rules of practice, but they may modify the rules of practice to comply with statutory requirements, such as the deadline for agency approval or disapproval of sourcing area applications set forth in section 490(c)(3)(A) of the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. § 620b(c)(3)(A)); and holding that the chief administrative law judge did not err when he modified the Rules of Practice Governing Adjudication of Sourcing Area Applications and Formal Review of Sourcing Areas Pursuant to the Forest Resources Conservation and Shortage Relief Act of 1990); *In re Stimson Lumber Co.*, 56 Agric. Dec. 480, 489 (1997) (stating that generally administrative law judges and the judicial officer are bound by the rules of practice, but they may modify the rules of practice to comply with statutory requirements, such as the deadline for agency approval or disapproval of sourcing area applications set forth in section 490(c)(3)(A) of the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. § 620b(c)(3)(A)); and holding that the chief administrative law judge did not err when he modified the Rules of Practice Governing Adjudication of Sourcing Area Applications and Formal Review of Sourcing Areas Pursuant to the Forest Resources Conservation and Shortage Relief Act of 1990).

would not cause me to conclude that Respondent's Appeal Petition was timely. Despite the language in the Bench Decision and the Hearing Clerk's December 1, 1999, letter, which arguably indicate otherwise, the ALJ's decision announced orally at the close of the November 17, 1999, hearing became effective on December 22, 1999. Respondent's Appeal Petition, filed on January 7, 2000, after the ALJ's November 17, 1999, decision became effective, is too late to be considered.

Third, Respondent notes that, while Complainant filed a lengthy response to Respondent's Appeal Petition, Complainant did not argue that Respondent failed to file a timely appeal (Respondent's Pet. for Recons. at 3). I agree with Respondent's assessment of Complainant's Response to Respondent's Appeal. However, the litigants' failure to raise a jurisdictional issue does not give the Judicial Officer jurisdiction to hear an appeal petition filed after the administrative law judge's decision becomes effective.

Fourth, Respondent correctly points out that the decisions, which I cited for support of my conclusion that I have no jurisdiction to hear an appeal after an administrative law judge's decision becomes effective,<sup>12</sup> were all issued by the Judicial Officer and, with two exceptions, have not been appealed (Respondent's Pet. for Recons. at 3-4). However, the dearth of appeals from the Judicial Officer's decisions regarding the Judicial Officer's jurisdiction to hear appeal petitions under the Rules of Practice does not affect the precedential value of these decisions in administrative proceedings instituted under the Rules of Practice. Moreover, none of the Judicial Officer's decisions which have been appealed has resulted in a reversal of a decision regarding the Judicial Officer's jurisdiction to hear an appeal filed after an administrative law judge's decision becomes effective.<sup>13</sup>

---

<sup>12</sup>See *In re PMD Produce Brokerage Corp.*, 59 Agric. Dec. \_\_\_, slip op. at 5 n.2 (Feb. 18, 2000) (Order Denying Late Appeal).

<sup>13</sup>The United States Court of Appeals for the Third Circuit has not yet ruled on the respondent's appeal of the Judicial Officer's order in *In re Harold P. Kafka*, 58 Agric. Dec. \_\_\_ (Apr. 5, 1999) (Order Denying Late Appeal), *appeal docketed*, No. 99-5313 (3<sup>d</sup> Cir. May 13, 1999). The respondent in *In re Toscony Provision Co.*, 43 Agric. Dec. 1106 (1984), sought judicial review of the Judicial Officer's order denying late appeal. The United States District Court for the District of New Jersey reviewed the merits notwithstanding the respondent's late administrative appeal, but did not reverse the Judicial Officer's holding that the Judicial Officer has no jurisdiction to hear an appeal after the administrative law judge's decision becomes effective. *Toscony Provision Co. v. Block*, No. 81-1729 (D.N.J. Mar. 11, 1985), *aff'd*, 782 F.2d 1031 (3<sup>d</sup> Cir. 1986) (unpublished). Respondent notes that my citations to *Toscony* in *In re PMD Produce Brokerage Corp.*, 59 Agric. Dec. \_\_\_ (Feb. 18, 2000) (Order Denying Late Appeal), appear to be error (Respondent's Pet. for Recons. at 4 n.1). The case history reveals that my citations are not error: *In re Toscony Provision Co.*, 40 Agric. Dec. 533 (1981), *aff'd*, 538 F. Supp. 318 (D.N.J. 1982), *remanded by consent*, No. 82-5354 (3<sup>d</sup> Cir. Dec. 27, 1982), *decision on remand*, 43 Agric. Dec. 791 (1984), *order denying late appeal*, 43 Agric. Dec. 1106 (1984), *aff'd*, No. 81-1729 (D.N.J. Mar. 11, 1985) (court reviewed merits notwithstanding late administrative appeal), *aff'd*, 782 F.2d 1031 (3<sup>d</sup> Cir. 1986) (unpublished). For a discussion of the history of *Toscony* prior to

Fifth, Respondent contends that the Rules of Practice are consistent with Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure, but the Rules of Practice are not consistent with Rule 4(a)(1)(B) of the Federal Rules of Appellate Procedure, as follows:

The Judicial Officer also alleges [in *In re PMD Brokerage Corp.*, 59 Agric. Dec. \_\_\_, slip op. at 6-9 (Feb. 18, 2000) (Order Denying Late Appeal),] that the U.S.D.A.'s construction of the Rules of Practice [with respect to the Judicial Officer's jurisdiction to hear an appeal filed after an administrative law judge's decision becomes effective] are [sic] consistent with the Federal Rules of Appellate Practice [sic], specifically citing Fed. R. App. P. 4(a)(1), as follows:

**Rule 4. Appeal as of Right—When Taken**

**(a) Appeal in a Civil Case.**

**(1) Time for Filing a Notice of Appeal.**

**(A)** In a civil case . . . the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

**(B)** When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.

Thus, the Rules of Practice are consistent with Rule 4(a)(1)(A); however, they are not consistent with Rule 4(a)(1)(B), because there is no Rule of Practice that deals with the case of the United States, its officer or agency being a party, even though that is precisely the case in all cases before the Secretary, including this case.

Respondent's Pet. for Recons. at 4.

I agree with Respondent that the Rules of Practice do not contain a provision regarding the time for filing an appeal petition only if the United States, its officer, or agency is a party. However, the purpose for my discussing Rule 4(a)(1) of the Federal Rules of Appellate Procedure in *In re PMD Produce Brokerage Corp.*, 59 Agric. Dec. \_\_\_, slip op. at 6-9 (Feb. 18, 2000) (Order Denying Late Appeal), was merely to note that the jurisdictional bar under the Rules of Practice, which

---

March 11, 1985, see *Toscony Provision Co. v. Block*, No. 81-1729, slip op. at 2-7 (D.N.J. Mar. 11, 1985).

precludes the Judicial Officer from hearing an appeal that is filed after an administrative law judge's decision becomes effective, is consistent with the judicial construction of Rule 4(a)(1) of the Federal Rules of Appellate Procedure.<sup>14</sup>

Sixth, Respondent contends that the Rules of Practice are not consistent with the Administrative Orders Review Act, as follows:

The Judicial Officer further argues that his interpretation of the Rules of Practice [with respect to the Judicial Officer's jurisdiction to hear an appeal filed after an administrative law judge's decision becomes effective] is consistent with the Administrative Orders Review Act, 28 U.S.C. § 2344 (1976). [*In re PMD Produce Brokerage Corp.*, 59 Agric. Dec. \_\_\_\_, slip op. at 9 (Feb. 18, 2000) (Order Denying Late Appeal)]. As the Judicial Officer is aware, the Administrative Orders Review Act requires a petition to review a final order of an administrative agency to be brought within 60 days of the entry of the order. In fact, the decision in the instant case is from an initial

---

<sup>14</sup>See *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 203 (1988) (stating that since the court of appeals properly held petitioner's notice of appeal from the decision on the merits to be untimely filed, and since the time of an appeal is mandatory and jurisdictional, the court of appeals was without jurisdiction to review the decision on the merits); *Browder v. Director, Dep't of Corr. of Illinois*, 434 U.S. 257, 264 (1978) (stating that under Fed. R. App. P. 4(a) and 28 U.S.C. § 2107, a notice of appeal in a civil case must be filed within 30 days of entry of the judgment or order from which the appeal is taken; this 30-day time limit is mandatory and jurisdictional), *rehearing denied*, 434 U.S. 1089 (1978); *Martinez v. Hoke*, 38 F.3d 655, 656 (2<sup>d</sup> Cir. 1994) (per curiam) (stating that under the Federal Rules of Appellate Procedure, the time for filing an appeal is mandatory and jurisdictional and the court of appeals has no authority to extend time for filing); *Eaton v. Jamrog*, 984 F.2d 760, 762 (6<sup>th</sup> Cir. 1993) (stating that we have repeatedly held that compliance with Rule 4(a)(1) is a mandatory and jurisdictional prerequisite which this court may neither waive nor extend); *Price v. Seydel*, 961 F.2d 1470, 1473 (9<sup>th</sup> Cir. 1992) (stating that filing of notice of appeal within the 30-day period specified in Fed. R. App. P. 4(a)(1) is mandatory and jurisdictional, and unless appellant's notice is timely, the appeal must be dismissed); *In re Eichelberger*, 943 F.2d 536, 540 (5<sup>th</sup> Cir. 1991) (stating that Rule 4(a) of the Federal Rules of Appellate Procedure requires that a notice of appeal be filed with the clerk of the district court within 30 days after entry of the judgment; Rule 4(a)'s provisions are mandatory and jurisdictional); *Washington v. Bumgarner*, 882 F.2d 899, 900 (4<sup>th</sup> Cir. 1989) (stating that the time limit in Fed. R. App. P. 4(a)(1) is mandatory and jurisdictional; failure to comply with Rule 4(a) requires dismissal of the appeal and the fact that appellant is incarcerated and proceeding *pro se* does not change the clear language of the Rule), *cert. denied*, 493 U.S. 1060 (1990); *Baker v. Raulie*, 879 F.2d 1396, 1398 (6<sup>th</sup> Cir. 1989) (per curiam) (stating that so strictly has Rule 4(a) of the Federal Rules of Appellate Procedure been applied, that even a notice of appeal filed 5 minutes late has been deemed untimely); *Jerningham v. Humphreys*, 868 F.2d 846 (6<sup>th</sup> Cir. 1989) (Order) (stating that the failure of an appellant to timely file a notice of appeal deprives an appellate court of jurisdiction; compliance with Rule 4(a) of the Federal Rules of Appellate Procedure is a mandatory and jurisdictional prerequisite which this court can neither waive nor extend); *Myers v. Ace Hardware, Inc.*, 777 F.2d 1099, 1102 (6<sup>th</sup> Cir. 1985) (stating that an untimely appeal leaves the reviewing court without jurisdiction to hear the appeal); *Sofarelli Associates, Inc. v. United States*, 716 F.2d 1395, 1396 (Fed. Cir. 1983) (stating that Rule 4(a) of the Federal Rules of Appellate Procedure requires, *inter alia*, that when the United States is a party, a notice of appeal must be filed with the trial court within 60 days from the date of entry of the judgment, and it is well settled that this requirement is mandatory and jurisdictional).

decision by the ALJ, and not a final decision which can only be rendered by a Judicial Officer.

Respondent's Pet. for Recons. at 5.

The purpose for my discussing the Administrative Orders Review Act in *In re PMD Produce Brokerage Corp.*, 59 Agric. Dec. \_\_\_, slip op. at 9 (Feb. 18, 2000) (Order Denying Late Appeal), was to note that the jurisdictional bar under the Rules of Practice, which precludes the Judicial Officer from hearing an appeal that is filed after an administrative law judge's decision becomes effective, is consistent with the judicial construction of the Administrative Orders Review Act.<sup>15</sup>

Seventh, Respondent contends that sections 1.142(c)(4) and 1.145(a) of the Rules of Practice (7 C.F.R. §§ 1.142(c)(4) and 1.145(a)) are not consistent (Respondent's Pet. for Recons. at 5-6). Section 1.142(c)(4) provides that an administrative law judge's decision announced orally at the hearing becomes effective 35 days after issuance, as follows:

**§ 1.142 Post-hearing procedure.**

....

(c) *Judge's decision.*

....

(4) The Judge's decision shall become effective without further proceedings 35 days after the issuance of the decision, if announced orally at the hearing, or if the decision is in writing, 35 days after the date of service thereof upon the respondent, unless there is an appeal to the Judicial Officer by a party to the proceeding pursuant to § 1.145; *Provided, however*, that no decision shall be final for purposes of judicial review except a final decision of the Judicial Officer upon appeal.

7 C.F.R. § 1.142(c)(4).

---

<sup>15</sup>See *Jem Broadcasting Co. v. FCC*, 22 F.3d 320, 324-26 (D.C. Cir. 1994) (stating that the court's baseline standard long has been that statutory limitations on petitions for review are jurisdictional in nature and appellant's petition filed after the 60-day limitation in the Administrative Orders Review Act will not be entertained); *Friends of Sierra R.R. v. ICC*, 881 F.2d 663, 666 (9<sup>th</sup> Cir. 1989) (stating that the time limit in 28 U.S.C. § 2344 is jurisdictional), *cert. denied sub nom. Tuolumne Park & Recreation Dist. v. ICC*, 493 U.S. 1093 (1990); *Illinois Cent. Gulf R.R. v. ICC*, 720 F.2d 958, 960 (7<sup>th</sup> Cir. 1983) (stating that the Administrative Orders Review Act requires a petition to review a final order of an administrative agency to be brought within 60 days of the entry of the order and this 60-day time limit is jurisdictional in nature and may not be enlarged by the courts); *Natural Resources Defense Council v. Nuclear Regulatory Commission*, 666 F.2d 595, 602 (D.C. Cir. 1981) (stating that the purpose of the time limit in the Administrative Orders Review Act is to impart finality into the administrative process, thereby conserving administrative resources and protecting the reliance interests of those who might conform their conduct to the administrative regulations).

Section 1.145(a) of the Rules of Practice provides that an appeal petition must be filed within 30 days after receiving service of the administrative law judge's decision, as follows:

**§ 1.145 Appeal to Judicial Officer.**

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, a party who disagrees with the decision, or any part thereof, or any ruling by the Judge or any alleged deprivation of rights, may appeal such decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. As provided in § 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the petition, and the arguments thereon, shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations of the record, statutes, regulations or authorities being relied upon in support thereof. A brief may be filed in support of the appeal simultaneously with the petition.

7 C.F.R. § 1.145(a).

Section 1.147(c) of the Rules of Practice (7 C.F.R. § 1.147(c)) provides the methods by which documents and papers are served on a party other than the Secretary. However, there is no provision for service of a decision orally announced at the close of the hearing by an administrative law judge. Section 1.142(c)(2) of the Rules of Practice (7 C.F.R. § 1.142(c)(2)) provides that the date of issuance of a decision orally announced at the close of a hearing is the date that it is announced by the administrative law judge and not the date that the Hearing Clerk furnishes the respondent with a copy of the decision excerpted from the transcript. Moreover, section 1.142(c)(4) of the Rules of Practice (7 C.F.R. § 1.142(c)(4)) provides that an oral decision announced at the close of the hearing is effective 35 days after the oral decision is announced and not 35 days after the excerpt is furnished to the respondent. The record establishes that Respondent's counsel was present when the ALJ orally announced the decision at the close of the November 17, 1999, hearing. Under these circumstances, I find that for purposes of the time for filing its Appeal Petition in accordance with section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)), Respondent was "served" with the ALJ's decision on November 17, 1999, at the close of the hearing. Therefore, Respondent's Appeal Petition, filed on January 7, 2000, was filed 51 days after the ALJ "served" Respondent with the decision, and Respondent's Appeal Petition was filed too late to be considered.

For the foregoing reasons, the following Order should be issued.

**Order**

Respondent's Petition for Reconsideration is denied.

\_\_\_\_\_